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## **Taking place: Westphalia and the poetics of law**

Peter Fitzpatrick\*

The poem has to keep its possibility. It cannot be rendered into an insistent meaning. Yet the poem is also a ‘way of happening’, a way of bringing possibility into happening.<sup>1</sup> And Cixous would find an intimate tie linking poetry and the happening of history, an ever-generative history, and would find this at its ‘most compelling’ in ‘the texts of some Russian women poets’.<sup>2</sup> So, a belated epigraph from Tsvetayeva:

What shall I do ...  
with all this immensity  
in a measured world?<sup>3</sup>

What follows is an awed companion-piece to Yoriko Otomo’s ‘Her proper name: A revisionist account of international law’. It is entirely amenable yet a matter of affinities rather than explicit interpretation. These affinities will be evoked by way of a shared terminology: time, feminine, law, myth, sovereign, Westphalia. Quotations in italics will be from the poem.

### WESTPHALIA

Revisionist accounts well summarise the mantric invocations of the event abbreviated in ‘Westphalia’ as the origin of the modern system of sovereign states and of ‘international’

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<sup>1</sup> W H Auden, ‘In Memory of W. B. Yeats’, in *Selected Poems* (Faber and Faber, 1979) 80, 82.

<sup>2</sup> H Cixous, *Readings, The Poetics of Blanchot, Joyce, Kafka, Kleist, Lispector, and Tsvetayeva* (University of Minnesota Press, 1991) 110.

<sup>3</sup> M. Tsvetayeva, ‘The Poet’, *Selected Poems*, trans. Elaine Feinstein (Penguin, 1974) 64, 66.

law. So, as Lesaffer tells us, ‘historians and international lawyers alike have for a long time been quite unanimous in calling the Peace Treaties of Westphalia of 1648 the very birth certificates of the modern European state system and the modern law of nations’.<sup>4</sup> Even more expansively, and as Inayatullah and Blaney note, ‘Westphalia normally is seen as a key marker of the eclipse of the medieval world by modernity’.<sup>5</sup> And they would add: ‘the predominant view of the Peace of Westphalia’ would see it ‘as signaling the move from a religious to a modern, secular world and from the accepted, if somewhat vaporous, goal of a united Christendom to a system, or perhaps society, of independent states’.<sup>6</sup> This was a supposedly secular state system in which spatially demarcated entities can marvellously assume the capacity of universal determination. And just as marvellously, borrowing Koskenniemi’s account of ‘the founding myth of the system’, the society of these independent states ‘would now arise from itself and not from any religious, moral or political notions of the good external to it’.<sup>7</sup> Indeed such a society was to have no commonality at all, and this to such a complete extent that, according to Vattel, none of its members ‘yield...rights to the general body’, each sovereign state being somehow ‘independent of all the others’.<sup>8</sup>

Mercifully, Lesaffer also references several ‘scholars from various countries and disciplines’ who by now ‘have gone a long way to challenging this Westphalian myth’.<sup>9</sup> Most would question whether there was a qualitative break from the medieval into the ‘modern’ state system, and in so doing they would emphasise key elements of continuity between the two such as, with Joyce, the fact that cohesive ‘independent’ states pre-existed Westphalia, and close observation of its ‘complex territorial settlement reveals Westphalia did not

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<sup>4</sup> R Lesaffer, ‘Peace treaties from Lodi to Westphalia’, in R Lesaffer (ed.), *Peace Treaties and International Law in European History: From the Late Middle Ages to World War One* (Cambridge University Press, 2004) 9, 9.

<sup>5</sup> N Inayatullah and D Blaney, *International Relations and the Problem of Difference* (Routledge, 2004) 31.

<sup>6</sup> Inayatullah and Blaney (2004) 23-4.

<sup>7</sup> M Koskenniemi, ‘What Is International Law For?’ in M D Evans (ed.) *International Law 3<sup>rd</sup> Edition* (Oxford UP, 2010) 32, 33.

<sup>8</sup> E de Vattel, *The Law of Nations or The Principles of Natural Law Applied to the Conduct and to the Affairs of Nations and Sovereigns Volume 3*, trans. Charles G Fenwick (Carnegie Institute, 1916) 9.

<sup>9</sup> Lesaffer (2004) 9.

establish or consolidate a principle that states constitute their own authority in and of themselves'.<sup>10</sup>

If the received version of Westphalia does not accord with historical 'fact', what genre might accommodate it? An answer is implicit in Krasner's trenchant depiction of 'Westphalia and all that'.<sup>11</sup> He comprehensively rejects the usual depiction and finds Westphalia itself to be conspicuously more a matter of continuity and the affirmation of medieval and Christian mores. Specifically, Krasner finds that Westphalia did not originate 'a new international order, one based on independent sovereign states'.<sup>12</sup> Yet, and this is the rub, he would still affirm a constituent connection between Westphalia and this order with its sovereign states. And it is the case that Westphalia did much to subordinate religion to various delimited forms of political rule, including the 'sovereign' state, even as Westphalia also 'constrained the authority of the sovereign' in this.<sup>13</sup> Not only that, with the state eventually emergent from Westphalia '[t]he positive content of sovereignty, the areas over which the state can legitimately command, has always been contested', and contested to an extent that would counter its claim to an integral supremacy.<sup>14</sup> The mystery is now compounded. Not only does the originary claim for Westphalia not accord with 'fact', neither does its eventual and prime creation, the sovereignty of the state. Evidently we are dealing with a genre different to the historiographic.

## MYTH

[A] mythic time for a mythic place. The revisionist literature has its own mantric invocation: Westphalia is a 'myth', or more pointedly it is a 'myth of origin', a 'founding mythology'.<sup>15</sup> A myth is sacred but also mediative: 'myths describe the ... breakthrough of the sacred ... into

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<sup>10</sup> R Joyce, 'Westphalia: event, memory, myth' in F Johns, R Joyce and S Pahuja (eds) *Events: The Force of International Law* (Routledge, 2011) 55, 61.

<sup>11</sup> S D Krasner, 'Westphalia and All That' in J Goldstein and R O Keohane (eds) *Ideas and Foreign Policy: Beliefs, Institutions, and Political Change* (Cornell UP, 1993) 235.

<sup>12</sup> Krasner (1993) 235-6.

<sup>13</sup> Krasner (1993) 242.

<sup>14</sup> Krasner (1993) 236.

<sup>15</sup> For the latter two see S Pahuja, *Decolonising International Law: Development, Economic Growth and the Politics of Universality* (Cambridge UP, 2011) 132 and R B J Walker, *After the Globe, Before the World* (Routledge, 2010) 131.

the world' and it is such a 'breakthrough of the sacred that really *establishes* the world'.<sup>16</sup> As myth, Westphalia becomes in the world 'part of a process of enshrinement of the nation-state system'.<sup>17</sup> And returning to conventional attributions, there was a new 'pattern of relations among increasingly autonomous states ... consecrated by the Peace of Westphalia'.<sup>18</sup> Whilst this is a 'consecration' of what supposedly is in the profane world, consecration would effect a transcendence of the limits of Westphalia as an event within that world.

The limits of the worldly origin are evident enough. For Cixous, the enduringly determinate origin is the place of set and secure return to which 'he' will resort, but 'she' will go further, always moving 'to the unknown', dissipating the masculinized origin yet still being of the origin – of a labile 'origin which always deals with some kind of femininity'.<sup>19</sup> Yet 'his' origin cannot avoid movement even as it flies *too near already to the sunne*, the dissolving sun. No matter what its positioned realization, there is always something of the origin before it and something carried on by it, and whatever comes after and ensues in relation to the origin will continually reconstitute it. The origin can neither emerge *ex nihilo* nor 'in itself' sustain a constant completeness. So, the event of origin will be ever attuned to 'the surplus that overflows' it.<sup>20</sup>

For the origin to have some 'positive' determinacy, that overflow has to be contained and the *seal o'er the yawning catastrophe* secured for the time being. The originating event's 'being determined as such does not signify that there is some event in which the "proper self" would spring forth, like a jack-in-the-box, but that the coming is in itself and by itself appropriative as such'.<sup>21</sup> And if the originating event is to be sustained, there must also be a responsive accommodating of the overflow. In all, and operatively, the myth becomes a generative relation between the appropriation and the accommodation.

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<sup>16</sup> M Eliade, *Myth and Reality* trans. Willard R Track (Harper & Row, 1963) 6 (his emphasis).

<sup>17</sup> Inayatullah and Blaney (2004) 31.

<sup>18</sup> G Poggi, *The Development of the Modern State: A Sociological Introduction* (Hutchinson, 1978) 89.

<sup>19</sup> H Cixous, 'Sorties', in H Cixous and C Clement *The Newly Born Woman*, trans. Betsy Wing (Manchester UP, 1986) 66, 93; Cixous (1991) 3.

<sup>20</sup> J-L Nancy, 'The Surprise of the Event' in *Being Singular Plural*, trans. Robert D Richardson and Anne E O'Byrne (Stanford UP, 2000) 159, 162.

<sup>21</sup> Nancy 'Of Being Singular Plural', in Nancy (2000) 1, 95.

That generative relation is subsumed in the mythic elevation of the origin, an elevation importing a seized temporality, an ‘internal teleology of time’.<sup>22</sup> With this sublimation the origin becomes an invented ‘grand beginning’, one obscuring the comparative ‘meanness’ of the actuality of ‘beginnings’.<sup>23</sup> Yet the mythic origin cleaves to delimited actuality – to a *numbering precisely* and to a *short day, for Westphalian Octobers are quick pass’d by the Sunne*, by a *sunne* nearness to which would melt the waxen seal which prospectively enables an illimitable sovereign power to *take place*, to take a mundane place, a place drawing in *Divine time, a Perpetual but Human, Time* and as such a *mythic time for a mythic place*. So, taking the paradigm instance, the ‘fiction’ of ‘the King’s Two Bodies’, combining the human body with the body perpetually ruling, is mythic in being embedded in the mundane, existent body.<sup>24</sup> *In the Sovereign’s likeness to Human lies a fiction within a fiction. The body dieth but the figure survives ...*

## SOVEREIGN

The drawing of the illimitable into the limited becomes the generative impetus of sovereign power, a power *without Reservation*, all-encompassing and *Binding no less the absent than the present, the Ecclesiastics than the Seculars*, ensuring that a finality of determination *shall take place*. Yet this taking is to be within a delimited place – within *boundary Walls: those that enclose what they call, their Territories*. This place taken is a *mythic place*. It is a figuring with-in the profane world of a transcendent boundary that can divide ultimately what is inside it and what is outside. The ultimacy, the universality of this ability imports the transcendent. More expansively, the bringing of a universally determinative competence within a delimited place – a ‘limitless reign of the Limit’ – ramps that place up to the transcendent.<sup>25</sup> And with that transcendence, sovereignty in its ‘unlimited and unconditional

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<sup>22</sup> Cf. M Foucault, ‘What is enlightenment?’, trans. Catherine Porter, in *Ethics: Subjectivity and Truth, Essential Works of Foucault 1954-1984 Volume One* (Penguin, 2000) 503, 508.

<sup>23</sup> A mix of Derrida, *Cosmopolitanism and Forgiveness*, trans. Mark Dooley and Michael Hughes (Routledge, 2001) 57 and M Foucault, ‘Truth and Juridical Forms’, trans. Robert Hurley, in *Power: Essential Works of Foucault 1954-1984 Volume Three* (Penguin, 2001) 1, 7.

<sup>24</sup> E H Kantorowicz, *The King’s Two Bodies: A Study in Medieval Political Theology* (Princeton UP, 1957) 3. Here Kantorowicz says that the idea is ‘mystic’ but he equates ‘mysticism’ and ‘myth’ – a rather loose equation. (‘Correcting’ Kantorowicz does feel like the height of presumption.)

<sup>25</sup> See G Deleuze and F Guattari, *What is Philosophy?*, trans. Hugh Tomlinson and Graham Burchill (Verso, 1994) 44-5, 47. And for the quoted phrase see M Foucault, ‘A Preface to Transgression’, in *Language, Counter-*

power’ becomes for Derrida a ‘theo-logic’, something that ‘remains a theological inheritance that has not really been secularized’.<sup>26</sup> Likewise Nietzsche finds that with the death of God the state becomes a ‘new idol’, acting still like ‘the ordaining finger of God’ – *the Icon in his place*.<sup>27</sup>

It is also the case, as Pahuja has it, that ‘the dimensions of international law after god’s death remain what we might call “theological”’.<sup>28</sup> This is an affront to orthodoxy. Taking Schmitt as its exemplar, whilst of course ‘[a]ll significant concepts of the modern theory of the state are secularized theological concepts’, divinity is drained in that extraversion of states making up the international.<sup>29</sup> For now, this can be seen as a deduction from Schmitt’s asserting a quality of the international not unlike that found in ‘classic’ notions of international law touched on earlier – notions through which, returning to Koskenniemi on Westphalia as ‘the founding myth of the system’, the society of independent states ‘would now arise from itself and not from any religious, moral or political notions of the good external to it’.<sup>30</sup> So, Schmitt would inveigh against ‘humanity’ as a political force transcending the relation between states.<sup>31</sup> Here yet again the invocation of myth is fitting. The self-sufficing nation-states assume an earthly existence as an ‘international community’ but that concept becomes oxymoronic if, in agreement with Nancy now, ‘[a] community is the presentation to its members of their mortal truth (which amounts to saying that there is no community of immortal beings ... )’.<sup>32</sup> For immortal beings, one would instead have to

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*Memory, Practice: Selected Essays and Interviews*, trans. Donald F Bouchard and Sherry Simon (Cornell UP, 1997) 29, 32.

<sup>26</sup> J Derrida, ‘The Ends of Man’, in *Margins of Philosophy*, trans. Alan Bass (Harvester Wheatsheaf, 1982) 109, 116.

<sup>27</sup> F Nietzsche, *Thus Spoke Zarathustra*, trans. Adrian Del Caro (Cambridge UP, 2006) 34-5 (First Part ‘On the New Idol’.) And for the ‘finger of God’ see also *Exodus* 31:18.

<sup>28</sup> Pahuja (2011) 132.

<sup>29</sup> C Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty*, trans. George Schwab (The University of Chicago Press, 2005) 36 for the quotation.

<sup>30</sup> Koskenniemi (2010) 33.

<sup>31</sup> C Schmitt, *The Concept of the Political*, trans. George Schwab (The University of Chicago Press, 2007) 54, 79.

<sup>32</sup> J-L Nancy, ‘The Inoperative Community’, in *The Inoperative Community*, trans. Peter Connor and Lisa Garbus (University of Minnesota Press, 1991) 1, 15.

‘imagine ... a communion’, a communion mythically imagined as formed by reference to ‘a divine presence’, or by reference to a deific substitute such as ‘humanity’ – a humanity of the kind that Schmitt would ‘imagine’.<sup>33</sup>

Put in more arid terms, if distinct nation-states are to relate in and as community, there has to be some commonality between them inhabiting and delimiting each in its very distinctness. If, in terms of the classic conception of international law, states were entirely independent, either there would be no commonality at all or the only commonality available would be one where they were all the same – that is, if we were confined to resolutions within this world. The mythic alternative provides a transcendent resolution in which nation-states could be independent yet in relation – in a relation of communion set in a transcendent reference. In all, and returning to Schmitt, the very schema he would immunise, a society of entirely independent states, generates that ‘humanity’ he would set in diametric opposition to it.

## **FEMININE**

A puzzle remains: how can the society of independent states and the sovereign state itself assume their vaunted secularity when they depend integrally on the mythic and the transcendent? The prelude to an answer can be found in a return to Inayatullah and Blaney with their noting that ‘Westphalia is normally seen as a key marker of the eclipse of the medieval world by modernity’, and with their adding that ‘the predominant view of the Peace of Westphalia’ would see it as ‘signalling the move from a religious to a modern, secular world ...’.<sup>34</sup> What Westphalia makes and signals, more expansively, can be drawn out of the recent and intense focus on historical periodization, a focus that has been most conspicuous in scholarly resistance to the utter relegating of a medieval age as the constituent contrast to a modern age.<sup>35</sup> What is entailed in that relegation is the invention of a prior age which the supposedly modern age encompasses and against which it is radically set – an invention enabled by *[a] pharmakon ingest’d to Forget* the actuality of that prior age. The range of invention and rejection extends beyond a fictive status-ridden, oppressive medieval or feudal

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<sup>33</sup> J-L Nancy, ‘Of Divine Places’, in Nancy (1991) 110, 143.

<sup>34</sup> Inayatullah and Blaney (2004) 23, 31.

<sup>35</sup> See especially K Davis, *Periodization & Sovereignty: How Ideas of Feudalism & Secularization Govern the Politics of Time* (University of Pennsylvania Press, 2008).



age and includes, for example, the like attributions to various entirely 'other' peoples excluded from a universalized civility. Bringing this back to Westphalia, and with Walker:

Not the least difficulty with claims about 1648 as a founding moment...is that it leaves much of the world unaccounted for: as still unfounded; as lingering back in time, before the European achievement of secular freedoms...and yet somehow present within a world of modern states; as somehow outside while also inside the world of the modern international. The Treaty of Westphalia marks not only a foundational moment in which a properly modern world became possible as a condition of international relations but also as a moment at which another world was ordained in opposition to it; a world, in part, deemed bereft of civilization and thus legitimately subject to colonial exploitation ...<sup>36</sup>

All of which may seem simply to heighten the puzzle of how the secular exists along with the mythic and the transcendent. The elevated historical age has to assume transcendence, an all-encompassing ontological comprehension, if it were to encompass what is entirely 'other' to it and relegate other ages to a contained historical specificity. The puzzle, however, impels its own solution. Here the *passage secur'd is conditional, tho' they declare it unconditional*. If, say, the 'unconditional' claims of the sovereign state were placed in relation to the numberless and at times overwhelming contrary forces affecting them, those claims would be quite undermined. And their compliant connection to what came before historically would also be revealed, and their originary completeness shattered.<sup>37</sup> Escape from these mundane complicities would entail a positive reference to the mythic and the transcendent.

There was and is, however, an alternative. Instead of a positive reference, a negative universal reference was and is resorted to as that 'modern' we 'have never been'.<sup>38</sup> Bluntly, the entity elevated in negation becomes what certain alterities, certain 'others', are not. Or it becomes not what certain alterities are. Being 'purely' negative and being universal, the division and exclusion are complete. What is beyond the universal can only be utterly beyond. Hence, and for example, there is racism and the irreducible alterity of the relegated

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<sup>36</sup> Walker (2010) 131, 132.

<sup>37</sup> Krasner (1993) provides a pointed synopsis of such forces.

<sup>38</sup> B Latour, *We Have Never Been Modern*, trans. Catherine Porter (Harvester Wheatsheaf, 1993).

race. Yet that very appropriation of universality has, as universal, to be all-inclusive. So, the negative universal reference generates an antithesis but then includes that antithesis within itself. The now-included take on an operative part within the universal scheme whilst still being excluded from it. There is a consistency to this. Whilst the exclusion in its completeness is an utter denial of independent being, so also is the completeness of the inclusion. Borrowing an extensive category from Foucault, the ‘abnormal’ is ‘interior and foreign’, subjected to ‘an inclusion through exclusion’.<sup>39</sup>

With this negative universal reference, the feminine is inclusively contained, in such as *home* and *body-pieces*, yet also excluded in a *sacrifice* generating a deracinated *Security*. Yet the feminine resists this being encapsulated and relegated. It is *[n]ot mine history*. ‘Her’ history would fuse an *Intimate Time*, an inescapable now ‘from which time cannot ever depart’, and an ever-departing aleatory time, a *Loss of Being*, an opening always to possibility.<sup>40</sup>

## LAW

Oswald de Andrade ‘asked a man what Law was. He answered it was the assurance of the exercise of possibility’.<sup>41</sup> This ‘exercise’ matches the poetics of possibility and thence of law. As a verb, ‘exercise’ can mean to put in operation, to use as an instrument, to apply.<sup>42</sup> It can

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<sup>39</sup> M Foucault, *The Order of Things: An Archaeology of The Human Sciences* (Tavistock, 1970) xxiv; Foucault (2001) 78. And for an engagement with Foucault’s work as revelatory of the negative universal reference, see P Fitzpatrick, ‘Foucault’s Other Law’ in B Golder (ed.), *Re-reading Foucault: On Law, Power and Rights* (Routledge, 2013) 39, 45-49. To leave matters at that could involve a periodized leap similar to that being criticized. There was initially what could be called a mixed universal reference during that convenient invention of the historians, ‘the early modern’ period. Examples would include varieties of natural law and the divine right of monarchs.

<sup>40</sup> J Derrida, ‘*Ouise and Grammē*: Note on a Note from *Being and Time*, in *Margins of Philosophy*, trans. Alan Bass (University of Chicago Press, 1982) 29, 39. And for these dimensions of feminine time see E Bianchi, ‘The Interruptive Feminine: Aleatory Time and Feminist Politics’, in H Gunkel, C Nigianni and F Soderback (eds) *Undutiful Daughters: New Dimensions in Feminist Thought and Practice* (Palgrave Macmillan, 2012) 35.

<sup>41</sup> O de Andrade, ‘Anthropophagic Manifest 1928’, available at <http://www.emanuelpimenta.net/ebooks/archives/koellreutter/chapters/us/KOELL%20Emanuel%20Pimenta%20US%20Oswald%20de%20Andrade.pdf> (last visited 8 November 2013). Despite his being so obliging, the man is then eaten by Andrade which, even in such a manifesto, may appear somewhat severe. It seems that possibility for Andrade has to be saved even from those who would merely contemplate its ‘exercise’.

<sup>42</sup> These and the following are some of the meanings taken from ‘exercise, v.’ In OED Second edition on CD-ROM Version 4.0.

also mean to train oneself or others by practice, and to till the ground. The exercised, the tilled, retain possibility yet take on some continuing constitution from the exercise. With a poem, no matter what the profusion of interpretation, explanation, ‘reader response’, and even as ‘its measurelessness’ remains ‘hidden within the work’, it takes on a formative focus for that profusion by way of an always receptive relation to possibility.<sup>43</sup> Yet ‘the impulse that makes and comprehends’ is ultimately resisted.<sup>44</sup> Possibility exercised becomes the fusion of its realization with the practical infinity of what it could yet be.

Likewise with law. Law has to be a realized determinacy yet illimitably responsive to what may yet be – its *hidden sublime*. These dimensions of law ‘in their very heterogeneity ... are undissociable’.<sup>45</sup> Likewise for Cixous, feminine law ‘happens’ in ‘an opening and closing’.<sup>46</sup> For Derrida, this moment of happening, this temporal ‘moment’ of law ‘always takes place and never takes place in a presence’.<sup>47</sup> The ‘force’ of this moment generates ‘the whole history of law’, even as the law in its ‘opening’, its illimitable responsiveness, ‘must be without history, genesis, or any possible derivation’.<sup>48</sup>

Law would seem to be otherwise in its *masculinity*, law as *entire*, *the law of the same*: *he must set Law’s time to administrate his clean and proper state*. No law shall take place ever against this *full Jurisdiction ... : the power to kill within boundary walls*, with law thence becoming the means *to pursue Life by means other than Life*. Yet this straitened law, this contained creature of sovereign assertion, is undermined by the dependence of a ‘modern’ sovereignty on the ‘law’ sketched in the previous paragraph.

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<sup>43</sup> M Blanchot, ‘Orpheus’s Gaze’, in *The Space of Literature*, trans. Ann Smock (University of Nebraska Press, 1982) 171, 171.

<sup>44</sup> G Hill, A gloss on ‘Annunciations’, in K Allott (ed.), *Penguin Book of Contemporary Verse 1918-60* (Penguin, 1962) 390, 392.

<sup>45</sup> J Derrida, ‘Force of Law: The “Mystical Foundation of Authority”’, trans. Mary Quaintance, *Acts of Religion* (Routledge, 2002) 230, 257.

<sup>46</sup> Cixous (1991) 18, 19.

<sup>47</sup> Derrida (2002) 269-70 (emphasis in the original removed). In this, law exhibits ‘the non-contemporaneity with itself of the living present’: J Derrida, *Specters of Marx: The State of the Debt, the Work of Mourning, & The New International*, trans. Peggy Kamuf (Routledge, 1994) xix. Both this quotation and the one in the text are in italics in the originals

<sup>48</sup> Derrida (2002) 169; J Derrida, ‘Before the Law’, trans. Avital Ronell, in *Acts of Literature* (1992) 181, 191.

A reprise and elaboration. The negative universal reference ensued from the transcendent constituting of an occidental modernity. That reference could not be rendered positively in a modernity founded on an immanent secularity, one in which the transcendent was totally relegated. Yet with such modernity, sovereign rule depends on a transcendent competence of normative determination positively affirmed. What goes to generate a distinctly modern law is the inability of a negative reference assuredly to effect such a positive determination. This law, when in the service of such as sovereignty, has to assume a normative determinacy across a universal range, and to do this it has itself to be illimitably open to possibility. Such an illimitable law would be a vacuity free of any constraining content of its own. So, even as it effects a positive determinacy, this illimitable law could not itself be tied enduringly to any positivity. And in its illimitability, it stands apart from the delimited entities which in its instrumental subordination it otherwise serves. And it is in such standing apart that law provides the transcendent point from which positive determination can flow. Law's illimitability, its generative inability to be fixed to any positivity, enables it to effect a transcendence that is 'pure' in its not being implicate with a transcendence that is enduringly positive – a law that 'affirms itself as law and without reference to anything higher: to it alone, pure transcendence.'<sup>49</sup> As 'transcendent and theological' this law matches the pretension of the sovereign state, a match that is requisite if law is instrumentally to serve the sovereign state 'in any case'.<sup>50</sup> Yet that very matching leaves the sovereign state unable to encompass and subordinate law. Its relation to law remains unsettled.

This same transcendent, illimitable law cannot be rendered as the posited, the 'positive', bonded offspring of a Westphalian origin, either historically or mythically. Law, in sum and with Blanchot, is 'absolute and detached from any origin' anterior to itself'.<sup>51</sup> With its vacuous purity, with the incipience of its always being other and exterior to itself, with 'the very movement by which it formulates this exteriority as law', law has somehow to be conceived of, not just in a potential relation to what is outside what it may be at any one time,

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<sup>49</sup> M Blanchot, *The Step Not Beyond*, trans. Lycette Nelson (State University of New York Press, 1992) 25.

<sup>50</sup> Derrida (2002) 270 for the quoted description near the beginning of the sentence.

<sup>51</sup> Derrida (1992) 194.

at any ‘moment’ of law, but conceived of also as having that outside within itself, and as taking place ever in the contingency of its own assertion.<sup>52</sup>

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<sup>52</sup> M Blanchot, *The Infinite Conversation*, trans. Susan Hanson (University of Minnesota Press, 1993) 434.